lated on the supposition that the original court, though aware of the improper and informal preparation of the pleadings, decided nevertheless to pass on the merits. The rule of *Kleinschmidt* v. *Binzel, supra,* is, therefore, more likely to represent the position of the original court. In any event it is competent for the defendant, where the record leaves the matter in doubt, to show by extrinsic evidence, if there be any, the precise point determined in the former controversy. *Russell* v. *Place* (1876) 94 U. S. 606.

NEGLIGENCE—LIABILITY IN ABSENCE OF CONTRACTUAL DUTY—ARTICLES NOT DANGEROUS.—A child playing with "sparklers" set fire to her dress and was injured. On the package was printed "Do not touch glowing wire," "Sparks are harmless," "Harmless amusement for children." *Held,* though sparklers are not inherently dangerous, the defendant manufacturer is liable for negligence in not giving necessary warning with articles intended for the use of children. *Henry* v. *Crooks* (N. Y. 1922) 195 N. Y. Supp. 642.

There is an increasing tendency to impose a duty upon a manufacturer even in the absence of a contractual relation. See (1913) 13 COLUMBIA LAW REV. 264; (1916) 16 COLUMBIA LAW REV. 428. The first exception to the rule of non-liability was made in the case of articles inherently dangerous. See (1922) 22 COLUMBIA LAW REV. 680. Further extension included articles becoming dangerous through defects. *Ibid.* The tendency is most marked in the New York courts. In the leading case of *McPherson* v. *Buick Motor Co.* (1916) 217 N. Y. 382, 111 N. E. 1050 (broken automobile wheel), the Court said "We have put aside the notion that the duty to safeguard life and limb . . . grows out of contract and nothing else. We have put the source of the obligation where it ought to be . . . in the law." In *Glanzer* v. *Shepard* (1922) 233 N. Y. 236, 135 N. E. 275, the Court departed entirely from the idea of recovery because of danger, and allowed recovery by a third party purchaser for overpayment due to negligent weighing of beans by a weigher under contract with the seller. The Court said: "We state defendant's obligation in terms not of contract merely, but of duty . . . constantly the bounds of duty are enlarged by knowledge of a prospective use." Apparently following the same line of thought, the Court in the instant case said: "We think that a duty rested upon the manufacturer of such an article intended for the use of children to give a reasonable warning." The case indicates a disposition to impose an unqualified duty on which negligence can be predicated. The New York courts especially are allowing the tail to wag the dog, the exception to control the rule.

NEGLIGENCE—RES IPSA LOQUITUR—CARRIERS.—The plaintiff, a passenger on the left hand running board of the defendant's street car, was injured by a truck travelling in the opposite direction, which suddenly swerved to pass a machine in front of it, and struck the car. *Held,* one judge dissenting, the maxim *res ipsa loquitur* applies and establishes a prima facie case for the plaintiff. *Plumb* v. *Richmond Light & R. Co.* (1922) 233 N. Y. 285, 135 N. E. 504.

The maxim *res ipsa loquitur* has been applied extensively to carriers. *Breen* v. *N. Y. C. & H. R. R.* (1888) 109 N. Y. 297, 16 N. E. 60. The reasons usually given for its application have been the probability of lack of due care, *Judson* v. *Giant Powder Co.* (1895) 107 Cal. 549, 40 Pac. 1020, and the fact that the chief evidence of the true cause is practically accessible to the carrier but inaccessible to the injured party. See 4 Wigmore, *Evidence* (1905) §2509. In general the rule has been applied to cases where the injury has been caused by apparatus wholly under the control of the carrier. *Miller* v. *Ocean Steamship Co. of Savannah* (1890) 118 N. Y. 199, 23 N. E. 462; *Peoria, Pekin & Jacksonville R. R.* v. *Reynolds* (1878) 88 Ill. 418 (derailment); *Meier* v. *Penn R. R.* (1870) 64 Pa. St. 225 (breaking of axle); *Toledo, Wabash & Wesson R. R. v. Beggs* (1877) 85 Ill. 80 (break-

ing of wheel). Where the cause of the injury has been outside the control of the defendant, as a side collision with a vehicle, the courts have divided. *Houghton* v. *Market Street Ry.* (1905) 1 Cal. App. 576 (for its application); *contra, Chicago City Ry.* v. *Rood* (1896) 163 Ill. 477, 45 N. E. 238. An earlier New York case held that the principle did not apply, distinguishing a side from a head-on collision. *Alexander* v. *R. C. & B. R. R.* (1891) 128 N. Y. 13, 27 N. E. 950. The carrier is not an insurer of the safety of its passengers. *Grand Rapids & Indiana R. R.* v. *Huntley* (1878) 38 Mich. 537. Negligence of the defendant is thus a necessary element in the plaintiff's case. From the facts of the instant case the probability of negligence is not apparent, nor is there any knowledge as to the cause of the injury peculiar to the defendant. As the reasons for the application of the doctrine are not present, therefore, it would seem that the maxim should not apply.

PRINCIPAL AND AGENT—UNDISCLOSED PRINCIPAL—STATUTE OF FRAUDS.—The parties entered into an oral contract for 6500 bushels of wheat. The plaintiff had 2400 bushels of his own and was agent for two undisclosed principals for the remainder. The purchaser paid $100 as part payment on the purchase price and later refused to accept the wheat. In a suit on the contract, *held,* the plaintiff could recover only for 2400 bushels, since the part payment only took the contract to sell his own wheat out of the Statute of Frauds. *King* v. *Farmers' Grain Co. of Dawson* (Iowa 1922) 188 N. W. 720.

An undisclosed principal can sue on contracts made by his agents for him. *Planters' Gin Co.* v. *Pitts Banking Co.* (1920) 24 Ga. App. 731, 102 S. E. 183; *Kelly Block Co.* v. *Barber-Page & Co.* (1914) 211 N. Y. 68, 105 N. E. 88. If there are two or more undisclosed principals they cannot maintain separate actions on an entire contract. *Midwood Sons Co.* v. *Alaska Portland Packing Co.* (1907) 28 R. I. 303, 67 Atl. 61; *Roosevelt* v. *Doherty* (1880) 129 Mass. 301. This rule is based on a desire to protect third persons from a multiplicity of suits. See *Roosevelt* v. *Doherty, supra,* 35. But where the principals have prosecuted separate actions to judgment the defendant cannot object to this for the first time on an appeal. *St. Louis R. R.* v. *Thatcher* (1874) 13 Kan. 564. An agent for an undisclosed principal may recover for the whole contract. *Buffington* v. *McNally* (1906) 192 Mass. 198, 78 N. E. 309, though there is more than one principal, *Tueson Fruit Co.* v. *Earl Fruit* Co. (1898) 53 Pac. 693, 695, or the agent himself shares an interest in the contract with an undisclosed principal. *Stack* v. *Gudgel* (1916) 60 Okla. 32, 158 Pac. 1144. In an action by the plaintiff on a contract made in his own name, it is immaterial that he acted for an undisclosed principal. See *Wright* v. *Seattle Grocery Co.* (1919) 177 Pac. 818, 822. But for the Statute of Frauds the plaintiff could, therefore, have recovered for all the wheat.

The defendant intended to contract with the plaintiff for the full amount of the wheat; he knew no one else. The part payment was made on the entire transaction regarded as a unit. It is difficult, therefore, to see why the part payment to the plaintiff did not take the whole contract out of the Statute of Frauds.

REAL PROPERTY—RAILROAD RIGHT OF WAY—ADVERSE POSSESSION.—In 1890 the defendant granted to the plaintiff a railroad right of way over his farm land, to be fifty feet on each side of the centre line of the railroad. The defendant built fences twenty-five feet from the centre line on each side, and used the fifty feet of land so fenced off for agricultural purposes. The plaintiff had no use for the land used by the defendant. In 1917 or 1918 the plaintiff was informed that the defendant denied the plaintiff's right of way. In 1919 the railroad brought this action of ejectment. *Held,* the plaintiff's action was not barred; *semble,* had the defendant used the land for the full prescriptive period, after